

Subpart C—Rulemaking Proceedings

AUTHORITY: 5 U.S.C. 553.

SOURCE: 28 FR 12432, Nov. 22, 1963, unless otherwise noted.

GENERAL

§ 1.399 Scope.

This subpart shall be applicable to notice and comment rulemakings proceedings conducted under 5 U.S.C. 553, and shall have no application to formal rulemaking (or rate making) proceedings unless the Commission directs that it shall govern the conduct of a particular proceeding.

[42 FR 25735, May 19, 1977]

§ 1.400 Definitions.

As used in this subpart, the term *party* refers to any person who participates in a proceeding by the timely filing of a petition for rule making, comments on a notice of proposed rule making, a petition for reconsideration, or responsive pleadings in the manner prescribed by this subpart. The term does not include those who submit letters, telegrams or other informal materials.

[41 FR 1287, Jan. 7, 1976]

PETITIONS AND RELATED PLEADINGS

§ 1.401 Petitions for rulemaking.

(a) Any interested person may petition for the issuance, amendment or repeal of a rule or regulation.

(b) The petition for rule making shall conform to the requirements of §§ 1.49, 1.52 and 1.419(b) (or § 1.420(e), if applicable), and shall be submitted or addressed to the Secretary, Federal Communications Commission, Washington, DC 20554.

(c) The petition shall set forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner will be affected.

(d) Petitions for amendment of the FM Table of Assignments (§ 73.202 of this chapter) or the Television Table of Assignments (§ 73.606) shall be served

by petitioner on any Commission licensee or permittee whose channel assignment would be changed by grant of the petition. The petition shall be accompanied by a certificate of service on such licensees or permittees. A draft Notice of Proposed Rule Making may be submitted with a petition for amendment of the FM or Television Table of Assignments.

(e) Petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner.

[28 FR 12432, Nov. 22, 1963, as amended at 28 FR 14503, Dec. 31, 1963; 40 FR 53391, Nov. 18, 1975; 45 FR 42621, June 25, 1980]

§ 1.402 Pioneer's preference.

(a) When filing a petition for rule making pursuant to § 1.401 that seeks an allocation of spectrum for a new service or that, by use of innovative technology in a new spectrum allocation, will substantially enhance an existing service, the petitioner may also submit a separate request that it be awarded a pioneer's preference in the licensing process for the service. Alternatively, if in an existing proceeding in which a notice of proposed rule making has not yet been adopted the Commission is addressing the new service or technology for which an applicant seeks a pioneer's preference, the applicant need not file a rule making petition but only a preference request. Each preference request must contain pertinent information concerning a description of the service to be provided, the applicant's plan for implementing the service, the frequencies it proposes to use, and the area for which the preference is sought, and must address any conflicting licensing rules, showing how these rules should or should not apply. The applicant must demonstrate that it (or its predecessor-in-interest) has developed the new service or technology; *e.g.*, that it (or its predecessor-in-interest) has developed the capabilities or possibilities of the technology or service or has brought them to a more advanced or effective state. The applicant must accompany its preference request with either a demonstration of the technical feasibility

of the new service or technology or an experimental license application, unless an experimental license application has previously been filed for that new service or technology. If the applicant files or has filed an experimental license application, it must specify the area in which it intends to conduct its experiment and whether that is the area for which the preference is sought. In determining in its discretion whether to grant a pioneer's preference, the Commission will consider whether the applicant has demonstrated that it (or its predecessor-in-interest) has developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service. Additionally, the preference will be granted only if rules, as adopted, are a reasonable outgrowth of the proposal and lend themselves to the grant of a preference.

(b) Pioneer's preference requests relating to a specific new spectrum-based service or technology will not be accepted after the Commission's Sunshine Notice is issued announcing initiation, by either a notice of inquiry or notice of proposed rule making that will be considered by the Commission at a public meeting, of a proceeding pertaining to that service or technology. Alternatively, if the Commission initiates a new proceeding pertaining to a specific new spectrum-based service or technology by notation, pioneer's preference requests will not be accepted after such notice is submitted to the Commission for vote.

(c) Pioneer's preference requests complying with the requirements and procedures in paragraphs (a) and (b) of this section will be accepted for filing and listed by file number in a notice of proposed rule making addressing the new service or technology proposed in the request, if such a notice of proposed rulemaking is adopted. A final determination on a request for pioneer's preference and its scope will normally be made in a report and order adopting new rules for the service or technology proposed in the request, if such rules are adopted. If awarded, the pioneer's preference will provide that the preference applicant's application for a construction permit or license

will not be subject to mutually exclusive applications. If granted, the construction permit or license will be subject to the conditions in paragraphs (e) and (f) of this section.

(d) Any interested person may file a statement in support of or in opposition to a request for pioneer's preference listed in a notice of proposed rule making, and a reply to such statements, subject to filing deadlines that shall be published in the notice of proposed rule making. Statements on the merits of pioneer's preference requests must be filed separate from, and not part of, any comments on the rules proposed in the notice of proposed rule making. Statements on pioneer's preference requests will not be accepted prior to issuance of the notice of proposed rule making.

(e) As a condition of its license grant, a pioneer's preference grantee will be required to construct a system that substantially uses the design and technologies upon which its pioneer's preference award is based within a reasonable time, as determined by the Commission, after receiving its license. Failure to comply with this provision will result in revocation of the pioneer grantee's license, and transfer of the license will be prohibited until this requirement is met.

(f) In services in which licenses are assigned by competitive bidding, any parties receiving pioneer's preferences will be required to pay for their licenses in accord with the payment formula specified in the General Agreement on Tariffs and Trade legislation, Pub. L. 103-465. This formula requires that pioneers pay in a lump sum or in installment payments over a period of not more than five years 85 percent of the average price paid for comparable licenses. Comparable licenses will be determined by the Commission on a case-by-case basis. For licenses issued on or after August 1, 1994, the Commission shall recover for the public a portion of the value of the public spectrum resource made available to a pioneer's preference recipient by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by—

(1) Identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(2) Dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(3) Computing the average of the per capita bid amounts for the licenses identified under paragraph (f)(1) of this section;

(4) Reducing such average amount by 15 percent; and

(5) Multiplying the amount determined under paragraph (f)(4) of this section by the population of the service area of the license obtained by such person.

(g) In services in which licenses are awarded by competitive bidding, a pioneer that qualifies as a designated entity will be eligible for installment payments under the same terms and conditions as other designated entities in that service, except that in all services the pioneer's payments must be completed within a five year period that will begin 30 days after the auction for comparable licenses has concluded or 30 days after the pioneer's license grant becomes final, whichever is later. A pioneer, like other applicants, will be required in its license application to certify and make the requisite demonstration that it is eligible for installments. Pioneers that are not eligible for installment payments must make the 85 percent payment specified in § 1.402(f) within 30 days after the auction for comparable licenses has concluded or within 30 days after the license grant becomes final, whichever is later.

(h) For pioneer's preference requests accepted for filing after September 1, 1994, an opportunity for review and verification of the requests by experts who are not Commission employees will be provided by the Commission. The Chief, Office of Engineering and Technology (OET) may select a panel of ex-

perts consisting of persons who are knowledgeable about the specific technology set forth in a pioneer's preference request and who are neither employed by the Commission nor by any applicant seeking a pioneer's preference in the same or similar communications service. The panel of experts will generally be granted a period of up to 90 days, but no more than 180 days, to present their findings to the Commission. The Commission will generally establish, conduct, and seek the consensus of the panel pursuant to the Federal Advisory Committee Act, and will evaluate its recommendations in light of all the submissions and comments in the record. Panelists will have the authority to seek further information pertaining to preference requests and to perform field evaluations, as deemed appropriate by the Chief, OET.

(i) For pioneer's preference requests accepted for filing after September 1, 1994, in order to qualify for a pioneer's preference in services in which licenses are awarded by competitive bidding, an applicant must demonstrate that the Commission's public rulemaking process inhibits it from capturing the economic rewards of its innovation unless it is granted a pioneer's preference license. The applicant must show that it may lose its intellectual property protection because of the Commission's public process; that the damage to its intellectual property is likely to be more significant than in other contexts, such as the patent process; and that the guarantee of a license is a significant factor in its ability to capture the rewards from its innovation. This demonstration will be required even if the Commission has not determined at the time a pioneer's preference request is filed whether assignments in the proposed service will be made by competitive bidding.

(j) In the event of a conflict between this rule and any rule for a particular service that provides for the filing and consideration of competing applications, this rule shall prevail.

(k) This section, along with the other pioneer's preference rules specified in §§ 0.241(f) and 5.207 of this chapter, will

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cease to be effective on September 30, 1998.

[57 FR 7882, Mar. 5, 1992, as amended at 59 FR 42528, Aug. 18, 1994; 60 FR 13636, Mar. 14, 1995; 60 FR 32119, June 20, 1995; 61 FR 4918, Feb. 9, 1996]

§ 1.403 Notice and availability.

All petitions for rule making (other than petitions to amend the FM, Television, and Air-Ground Tables of Assignments) meeting the requirements of § 1.401 will be given a file number and, promptly thereafter, a "Public Notice" will be issued (by means of a Commission release entitled "Petitions for Rule Making Filed") as to the petition, file number, nature of the proposal, and date of filing. Petitions for rule making are available at the Commission's Dockets Reference Center (1919 M Street NW., Room 239, Washington, DC).

[60 FR 13637, Mar. 14, 1995]

§ 1.405 Responses to petitions; replies.

Except for petitions to amend the FM Television or Air-Ground Tables of Assignments:

(a) Any interested person may file a statement in support of or in opposition to a petition for rule making prior to Commission action on the petition but not later than 30 days after "Public Notice", as provided for in § 1.403, is given of the filing of such a petition. Such a statement shall be accompanied by proof of service upon the petitioner on or prior to the date of filing in conformity with § 1.47 and shall conform in other aspects with the requirements of §§ 1.49, 1.52, and 1.419(b).

(b) Any interested person may file a reply to statements in support of or in opposition to a petition for rule making prior to Commission action on the petition but not later than 15 days after the filing of such a statement. Such a reply shall be accompanied by proof of service upon the party or parties filing the statement or statements to which the reply is directed on or prior to the date of filing in conformity with § 1.47 and shall conform in other aspects with the requirements of §§ 1.49, 1.52, and 1.419(b).

(c) No additional pleadings may be filed unless specifically requested by the Commission or authorized by it.

(d) The Commission may act on a petition for rule making at any time after the deadline for the filing of replies to statements in support of or in opposition to the petition. Statements in support of or in opposition to a petition for rule making, and replies thereto, shall not be filed after Commission action.

(Secs. 4, 303, 307, 48 Stat., as amended, 1066, 1082, 1083; 47 U.S.C. 154, 303, 307)

[28 FR 12413, Nov. 22, 1963, as amended at 28 FR 14503, Dec. 31, 1963; 45 FR 42621, June 25, 1980; 46 FR 60404, Dec. 9, 1981]

§ 1.407 Action on petitions.

If the Commission determines that the petition discloses sufficient reasons in support of the action requested to justify the institution of a rulemaking proceeding, and notice and public procedure thereon are required or deemed desirable by the Commission, an appropriate notice of proposed rule making will be issued. In those cases where notice and public procedure thereon are not required, the Commission may issue a final order amending the rules. In all other cases the petition for rule making will be denied and the petitioner will be notified of the Commission's action with the grounds therefor.

RULEMAKING PROCEEDINGS

§ 1.411 Commencement of rulemaking proceedings.

Rulemaking proceedings are commenced by the Commission, either on its own motion or on the basis of a petition for rulemaking. See §§ 1.401-1.407.

§ 1.412 Notice of proposed rulemaking.

(a) Except as provided in paragraphs (b) and (c) of this section, prior notice of proposed rulemaking will be given.

(1) Notice is ordinarily given by publication of a "Notice of Proposed Rule Making" in the FEDERAL REGISTER. A summary of the full decision adopted by the Commission constitutes a "Notice of Proposed Rulemaking" for purposes of FEDERAL REGISTER publication.

(2) If all persons subject to the proposed rules are named, the proposal